83-1218

No.

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM DI BUONO, ASSIGNMENT JUDGE, et. al.
Petitioners

v.

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated,
Cross-Petitioners,

v.

WILLIAM H. FAUVER, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF NEW JERSEY, and his successor in his official capacity,
Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision, which imposes conditions of severe overcrowding on pretrial detainees at an antiquated county jail and undermines the ability of jail administrators to preserve institutional security, is in direct conflict with the Due Process analysis mandated by Bell v. Wolfish, 441 U.S. 520 (1979), and followed by every other Circuit in the country?

2. Whether the Court of Appeals' decision, which imposes conditions of severe overcrowding on convicted prisoners at an antiquated county jail and undermines the ability of jail administrators to preserve institutional security, is in direct conflict with the Eighth Amendment analysis mandated by Rhodes v. Chapman, 452 U.S. 337 (1981), and followed by every other Circuit in the country?

3. Whether the Court of Appeals' de novo review of the carefully considered factual findings of the District Court is wholly inconsistent with the proper scope of review, as set forth in Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981), of claims of unconstitutional jail conditions?

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* PARTIES*

The petitioners in this action include Randolph Pisane, Director, Union County Department of Public Safety; Louis J. Coletti, Union County Deputy County Manager; Arthur Grisi, Union County Manager; and Charlotte DeFilippo, Chairman, Union County Board of Chosen Freeholders; as successors in office to the named defendants, Ralph Froelich, Union County Sheriff; James Scanlon, Jail Administrator; Thomas Jefferson, Jail Warden; and Rose Marie Sinnot, Chairman, Union County Board of Chosen Freeholders; in the courts below.

V. William DiBuono, Assignment Judge; Joseph G. Barbieri, Criminal Assignment Judge; and Cuddie E. Davidson, Bail Judge; as Representatives of the Criminal Courts, Union County, were dismissed as defendants.

The cross-petitioners in this matter are Timmie Lee Barlow, Elbert Evans, Jr., Raymond Skinner, and James Wysocki, the named plaintiffs in the courts below for a class of all inmates at the Union County Jail, Elizabeth, New Jersey.

The respondent is William H. Fauver, Commissioner, New Jersey Department of Corrections.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. D) is reported at 713 F.2d 984 (3rd Cir. 1983). The order denying rehearing (App. A) and the dissent from denial of rehearing in banc (App. B) are reported at 718 F.2d 1247 (3rd Cir. 1983). The District Court opinion (App. F) is reported at 537 F.Supp. 993 (D.N.J. 1982).

JURISDICTION

Judgment of the Court of Appeals was entered on August 11, 1983. A timely petition for rehearing in banc was denied (6-4) on October 5, 1983, with four judges dissenting and voting for rehearing. Time to file the instant petition was extended to January 18, 1984, by an Order of Justice Brennan. (A139)[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] Designations used in this petition are:
A - Appendix to the Cross Petition;
JA - The Joint Appendix below;
SA - Supplemental Appendix of Appellees below.
Decisions below are also cited to the appendix.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved are the Due Process Clause of the Fourteenth Amendment to the Constitution which, in part, provides: "nor shall any State deprive any person of...liberty...without due process of law," and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution which, in part, provides: "nor [shall] cruel and unusual punishments be inflicted."

STATEMENT OF THE CASE

Introduction

This case is before the Court in a unique and unprecedented posture. First, petitioners include both the inmates and the administrators of the Union County Jail in Elizabeth, New Jersey.[2] Both peti-

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[2] The inmates are represented by the New Jersey Department of the Public Advocate, a cabinet level department in the New Jersey state government. The jail's administrators and County Freeholders are represented by County Counsel of Union County.

tioners seek review of a Third Circuit panel decision imposing double bunking at an antiquated, severely overcrowded jail against the considered judgment of the jail's administrators, documented below, that this practice would imperil institutional security, exceed any reasonable limits of the physical plant, and endanger the safety and health of inmates and jail personnel alike.

Second, the constitutional straightjacket applied on the local jail authorities by the Court of Appeals panel compels these officials, in contravention of their sound judgment, to impose conditions upon the jail population that are more severe than those that have been tolerated in any other jail facility in the United States.

Third, in accomplishing a result that conflicts with the constitutionally protected rights of the inmates and the ability of jail officials to operate their institution,

the panel converted the flexible and balanced calculus employed in Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981) into a rigid and mechanical approach that does not serve either the inmates or their custodians and that threatens to remove the protection of the federal Constitution from this country's jails.

Fourth, the panel's legal analysis is fundamentally flawed by its disregard of factual findings that had been drafted by a Special Master who carefully considered a wealth of evidence from inmates and officials. Instead, the panel conducted a de novo review of the record and, without making any determination that the findings of both the Special Master and District Court were clearly erroneous, ignored the uncontroverted evidence that the double bunking and overcrowding required by its decision would work a severe hardship on

both inmates and the administrators at the Union County Jail.

Background

The Union County Jail (UCJ), located in the heart of Elizabeth, New Jersey, is an antiquated, eight-story facility, which was converted from a court house building to a jail in 1925. (JA10a). The jail's 19 cellblocks, with 218 cells, are where inmates spend virtually each day and hour of their confinement. (JA67a) The overwhelming majority of jail inmates are presumptively innocent detainees or persons convicted of shoplifting, driving on the revoked list, non-support, or minor property offenses. (JA269a-271a)

Each of the jail's cellblocks consists of a narrow corridor with clanging steel gates and a row of small, windowless metal cells. From 10 p.m. to 6 a.m. inmates are restricted entirely to these 39 square foot cells. Id. The cellblock corridor is

the sole area in which inmates may move freely at other times. Yet, as found by the Special Master, "even at normal population levels," the cell corridors "are cramped, overcrowded and would allow little opportunity for free movement or exercise."(JA84)

The narrow cellblocks in this decaying jail offer a dungeon-like spectacle, stripped of even the simplest amenities. There are no lights in either the cells or the cell corridor. The only illumination reaching these areas must filter through the floor-to-ceiling wrought iron bars from dim lights in an officers' walkway that runs parallel to the cellblock. (JA68a) The cellblocks are without any chairs or any tables. The 5½ foot wide corridor is constantly crowded with as many as 34 inmates at any one time moving in and out of the 17 cells for momentary relief from the cramped cells, to get a shower or to peer through the floor-to-ceiling wrought

iron bars for a glimpse of the television on the other side.(JA67a-68a, 84a)

The cells have only one piece of furniture -- a metal bunk attached to one wall, which is topped with a thin mattress; the bunk abuts a combination steel sink/toilet, the toilet bowl of which is always open and uncovered. (JA67a) The cells lack any hot water, and, when the jail has been overcrowded even cold water was lacking. (JA457a, 465a, 469a, 483a), The cell is not simply a place to sleep, for its metal bunk and toilet are the only places during the entire day where an inmate may sit on something other than the jail's cold and hard cement floor.

The jail has no general areas where meals can be served to the inmates. Therefore, all inmates must eat every meal on their laps while sitting on a bunk, an uncovered toilet, the cement floor, or while standing. The single shower at the

end of each cellblock has provided inmates with little more than a trickle of water in which to bathe during periods of overcrowding, due to the weak water pressure produced at these times by the antiquated jail's limited physical plant.(JA465a) With the overpopulation of the cellblocks, these showers were rarely maintained and water readily built up on the floors because there are no floor drains in the housing areas; as a consequence, inmates have suffered serious injuries from slipping and falling in the overutilized and unmaintained showers. (JA454a, 457a, 465a, 556a)

Toilets in the cells, when used by more inmates than the plumbing capacity is designed for, back up regularly, leaving cells filthy, with feces and urine all over the floor; this unhealthy condition would last for considerable periods of time, because inmates were not regularly provided materials for cleaning. (JA483a).

Since shoes are not issued by the jail, inmates often had to walk around barefoot in the cells and cellblocks. (JA453a) Clothing might not be cleaned for as long as once every two or three months (JA453a, 457a, 470a), and often the cleaning was inadequate to remove severe odors or dirt from the clothes. (JA476a).

It is in this harsh, decrepit environment that inmates must spend the overwhelming majority of their waking hours. (JA67a) For inmates at this traditional lock-up, there really is no respite from the teeming, crowded and depressing existence on the cellblocks. Both an unconvicted pretrial detainee and a person convicted of a minor offense, must try to read in the cramped, unlighted restroom-type stalls that constitute the cells; the person must go the bathroom under the gaze of numerous other individuals and must occupy a space that is physically inadequate to provide the

security and facilities for twice the number of inmates that it was intended to confine. The record is replete with the severe safety, health, and institutional crises which have resulted from this severe overcrowding. E.g. A129-134.

Even if an inmate were permitted to leave the cellblock, there is simply no place in the jail to find refuge from the pressures and hazards of the cellblock crowding. There are no dayrooms or all-purpose rooms. There are no classrooms. There is no outside yard.[3]

The desperate conditions at UCJ are the product of a state practice adopted in early 1981 of retaining great numbers of prisoners in locally operated county jails. This practice is now a national

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[3] One small room, at times, functioned as a chapel and contained some law books (thus, serving also as the jail's law library). Access to these areas had been curtailed by overcrowding. (JA76a) Two small rooms used as exercise areas had been converted to dorms. See note 11 infra. (JA68a)

phenomenon,[4] and has resulted in jail inmates, who have not been convicted of crimes or have been convicted only of minor offenses, generally living under harsher conditions than felons convicted of serious crimes and incarcerated in state prisons.[5]

Cross-petitioners, UCJ inmates, instituted this class action lawsuit to challenge the constitutionality of overcrowded conditions at the jail. (JA5a) County officials then filed a third-party complaint against the state Corrections Commissioner (hereafter "Commissioner"), alleging that

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[4] Overcrowding Spreads to Local Jails in U.S., N.Y.Times, Nov. 23, 1983, at A1, col. 2, A24, col. 1. Citing a recent Justice Department survey, the Times reported "state prison officials are increasingly attempting to put their overflow in county jails," resulting in "worsening problems for county sheriffs and jail officials" and leading to "jammed, makeshift jails." Id. In 1982, "17 states had a combined total of 8,217 state prisoners housed in local jails," and "[a]mong the worst cases...were New Jersey, with 1584 state prisoners in local jails; Alabama, with 1286, and Louisana, with 1499." Id. at A24, col. 1 (emphasis added).

[5] Id. at A24, col. 2.

his refusal to accept custody of state prisoners from the county jail created "an intolerable situation for all." (JA20a).

On October 22, 1981, the district court approved a consent agreement between the county and the inmates stipulating a maximum population capacity for the jail of 238 -- the level which the parties agreed was necessary to preserve the health and safety of the inmates, and manage the jail properly --and a procedure to be followed in the event the population exceeded 238.[6] (JA486a) See 537 F.Supp. at 997 n.11 (A81-82 n.11). Simultaneously, the county sought a preliminary injunction compelling the Commissioner to accept custody of all

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[6] The state Corrections Commissioner had conceded shortly before the commencement of this litigation that the jail had a maximum capacity of only 238 inmates, see 537 F.Supp. at 1011 (A111), which according to the Commissioner represented "the maximum number of prisoners which may be safely housed in that facility." Letter from William H. Fauver to Judge DiBuono, dated February 20, 1981. (JA585a) (emphasis added).

state prisoners in the jail[7]. (JA28a) The Commissioner then challenged the consent agreement.

In order to undertake a thorough examination of conditions at the jail prior

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[7] In support of this motion county officials submitted uncontroverted affidavits attributing a September 1981 riot, in which 6 corrections officers were held hostage at gunpoint, to a breach in security caused by overcrowding. (SA2pa) (A129). The overall administrative head of the jail, also attributed "a series of attempted suicides and two actual deaths" to the overcrowding, explaining:

> The mood at the County Jail is tense and unless we can receive immediate relief in the form of a substantial reduction in inmate population...I truly fear additional incidents at the jail which could prove more violent or damaging than those already suffered.

(SA3pa) (A129). Similarly, the County's Coordinator of Correctional Services cautioned:

> [T]he situation at the Union County Jail continues to be volatile, highly charged and, unless emergent action is taken to remove all state prison inmates to reduce our population to at or below our rated capacity, the very real possibility of another riot continues to exist. The present mood at the jail is a combination of hostility and fear -- hostility by the inmates because of the overcrowding, ...and fear on the part of both inmates and County employees and administrators because of the very real potential of another uprising.

(SA8pa) (A133).

to considering any changes in the consent decree or ruling on the county's motion, the district judge appointed the Honorable Worrall F. Mountain as Special Master pursuant to Fed. R. Civ. P. 53.[8] 537 F.Supp. at 998 & n.14 (A83). After conducting an extensive investigation, the Special Master rendered a report on March 1, 1982, which contained both detailed findings of fact and proposed conclusions of law.

The Master found that the jail was severely overcrowded. (JA69a-75a). High population levels caused principally by the presence of state prisoners had forced the jail's administrators to put two people

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[8] As a recently retired Associate Justice of the New Jersey Supreme Court, and a member of a recent Governor's Task Force on Prison Overcrowding, Justice Mountain was "particularly well-qualified" for assessing permissible conditions of confinement and the needs of the local jail administrators. 718 F.2d at 1249 n.5 (dissenting opinion) (A4 n.5). Similarly, the district judge also was "particularly knowledgeable about the conditions of the Union County Jail," having served many years as a Judge of the New Jersey Superior Court in Union County. Id.

in many of the jail's tiny cells for extended periods of time.[9] Close to 90 percent of these double-celled inmates were pretrial detainees.[10]

The Special Master found that, as a result of overpopulation each inmate had to be confined to a paltry amount of living space. (JA71a-73a, see also 203a-205a). In addition, the "severe overcrowding conditions" in the jail had adversely affected numerous other aspects of inmates' lives. (JA74a, 75a) In particular, the Special Master found that there was no "realistic opportunity" for inmates to obtain regular

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[9] Double celling was accomplished by the placement of a second mattress in each cell on the floor next to the urinal, thereby consuming virtually all of the 17 square feet of floor space that would otherwise be unoccupied. 537 F.Supp. at 999-1000 (A85-86); 718 F.2d at 1252 (dissenting opinion) (A11-12); JA70a.

[10] Of the jail's population, 57% regularly were pretrial detainees; yet they accounted for 142 of the 162 inmates being double celled in general population cells on an average day. 537 F.Supp. at 999 (A85); JA70a n.6.

physical exercise and recreation.[11] (JA75a) This was "particularly disturbing" to the Master "in view of the conditions of inmate confinement in the cell corridors." (JA75a); see 537 F.Supp. at 1006 (A87-88). As the Master starkly noted, the cellblocks "where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels." (JA84a) (emphasis added).

As a result of overcrowding, jail officials were unable to provide inmates with clean clothing and linen. Some inmates were required to wear the same clothes for several weeks. (JA76a) The availability of worship in the chapel and access to

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[11] Women had no recreation opportunity as their exercise area was converted to a dorm. (JA68a,75a) Time for exercise by male inmates was reduced to one hour periods, only twice per week. Id. See 537 F.Supp. at 1006 (A87-88).

the law library were delayed or curtailed. (JA76a) Incoming inmates could not be screened for infectious disease and subjected the entire population to a serious health risk. Visitation was sharply reduced to 5-10 minute visits, three times a week, virtually eliminating a vital source of contact that the mostly unconvicted detainees had with the outside world. (JA75a-76a)

The Master further found that the overcrowding situation had unquestionably resulted in an increase in scattered instances of inmate fighting, including a recent stabbing, and that "an extremely volatile situation" would be posed if overcrowding continued into summer. (JA77a) In making his findings, the Special Master repeatedly deferred to the expertise of the jail's actual administrators and relied on other uncontroverted facts in the record.[12]

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[12] The record established that overcrowding fostered increased violence, tension, hostility and [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

In his proposed conclusions of law, the Master found that "the totality of the overcrowding conditions at the jail . . . amount[ed] to 'genuine privations and hardship' which [could not] be justified by the mere fact that a statewide prison overcrowding problem exist[ed]." (JA82a) Recognizing the interrelationship between the jailhouse population and the ability

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]

fights among inmates and assaults by inmates upon each other and guards. (JA77a, 458a, 465a)(SA2pa-8pa)(A129-34). Security for UCJ inmates and staff had been jeopardized. (SA2pa-8pa)(A129-34). Crowding prevented effective classification by precluding the separation of detainees from county and state prisoners, and severely interfering with the ability of jail officers to separate inmates because of the inmates' medical conditions or dangerousness. (JA77a, SA2pa-8pa)(A129-34) Long delays were encountered in the receipt of intake medical examinations and requested medical services. (JA465a, 470a) Moreover, the overcrowded conditions at the jail had not only demonstrated the potential danger of serious harm to life and property (JA78a), but these dangers had already been realized in the riot, suicides and damage to property in disturbances. (SA2pa-8pa)(A129-34) Overpopulation and crowded conditions at the UCJ transformed a short-term detention facility intended primarily to house unconvicted detainees into what even county officials characterized as a "powderkeg" (SA32a), that could easily ignite from the widespread tension, fear, and anxiety. (SA3pa, 6pa).

to meet minimal constitutional requirements, the Master made the further specific finding that the maximum capacity of the jail is 244 persons,[13] which was the population at which he found it could "meet the basic human needs of the inmate population." (JA90a-91a)

All parties were given the opportunity to object to the Master's findings, but no objections were ever raised to the Master's findings of fact.[14] Subsequently, the Commissioner, for the first time, raised the issue of double bunking,[15] contending that the installation of a second bunk in each cell would cure all conditions con-

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[13] After 15 new intake cells were completed (which has now occurred), the maximum capacity of the jail would be 259 persons. (JA91a-92a)

[14] 537 F.Supp. at 1001 (A89). The Commissioner contested only the suggested remedy: requiring the state to remove its prisoners from the jail. (JA110a, 149a-150a); see 718 F.2d at 1254 (dissent)(A16).

[15] The Master never reached the issue of double bunking, noting: "None of the parties has testified, or otherwise suggested, that it would be feasible to equip the 39 square foot general population cells at the UCJ with two beds....[T]hat question was not raised in the record before me."(JA90a n.19).

demned by the Master despite the unprecedented rise in population to as many as 494 inmates which the practice would produce. (JA110a, 149a-150a) See 718 F.2d at 1258 (A24). Briefs were filed on the issue, but no additional factfinding was done. The county jail administrators and the inmates strenuously opposed double bunking as an illusory and destructive "remedy" under the particular circumstances present in the UCJ's general population cellblocks.

The district court reviewed the Master's findings of fact in accordance with the standard specified in Fed.R.Civ.P. 53(e)(2) and concluded that none of these findings was clearly erroneous. 537 F.Supp. at 1001 (A89). It then carefully applied the analysis in Bell v. Wolfish, 441 U.S. 520 (1979), relying on the Court's admonition that:

> [c]onfining a given number of people in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment....

537 F.Supp. at 1003, 1007 (citing 441 U.S. at 542)(A93, 102). The court emphasized that the UCJ differs markedly from the MCC facility at issue in Bell. Indeed, the court noted that double celling at the UCJ would be equivalent to quadruple celling in Bell. Moreover, unlike the MCC facility, there is no respite at all from the adverse effects of overcrowding at the UCJ. Id. at 1003-1005 (A93-99). Like the Special Master, the District Court accorded considerable deference in its analysis to the expertise of the jail's administrators.

With respect to convicted inmates, the lower court applied this Court's analysis in Rhodes v. Chapman, 452 U.S. 337 (1981). The court noted that even though double bunking would have the salutary effect of getting inmates off of mattresses on the floor, the stark reality of the UCJ was that the overpopulation, and not simply the sleeping arrangements, had forced

the jail's administrators to deny inmates basic services. In applying Rhodes, the district court followed the Court's directions and looked to "objective factors...to the maximum extent possible." 452 U.S. at 346.[16]

Based on the Master's findings and this Court's decisions in Bell and Rhodes, the district court concluded that it was necessary to limit the jail's population to 259 people in order to remedy the unsafe, unhealthy and inhumane conditions caused by overcrowding.[17] 537 F.Supp. at 1011 (A111). To reduce the population, the court ordered that the state begin to accept

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[16] The factors included were: (1) the expertise of the jail's actual administrators, 537 F.Supp. at 1011 (A110-11), (2) the effect overcrowding had on the jail's physical plant and programs, (3) state regulations fixing standards for county jails, id. at 1005 (A98), and (4) the fact that approximately 88% of all local jails nationwide meet or exceed the space considerations of his decision. Id. at 1005 n.18 (A99 n.18). See notes 35-38 supra.

[17] This figure was consistent with the UCJ administrators' views of the maximum number of individuals that could be safely and securely housed at the jail, (A136-37) (JA487a), as well as, with the maximum capacity only recently suggested by the Commissioner. 537 F.Supp. at 1011 (A111); see note 6 supra.

custody of its prisoners in accordance with procedures set forth in a state statute.[18]

The Commissioner appealed the decision to the Third Circuit. A panel of the Court of Appeals "substantially reversed all of the relief ordered by the district court," and essentially removed all limits on overcrowding at the UCJ. 718 F.2d at 1248, 1258 (dissenting opinion)(A3, 24). The panel's analysis dealt with isolated jail conditions, rather than the totality of conditions considered by the Special Master and the District Court. Focusing solely on the propriety of double bunking, 713 F.2d at 994 (A51-52), the panel ignored the considered judgments of the jail's administrators and required the district court to vacate any restrictions on double bunking and limits on the jail's population. The panel

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[18] See N.J.S.A. 2C:43-10(e). The County's compliance with the order requiring regular recreation and visitation programs, and other basic services, was expressly conditioned on a reduced population. (JA487a) 537 F.Supp. at 1011 (A110-11).

also rejected the requirement for removal of state prisoners. 713 F.2d at 1003 (A69-70).

On application for rehearing in banc, four members of the Court of Appeals voted for rehearing in banc.[19] In their dissenting opinion, three judges criticized the panel for (1) applying "bits and pieces of language" from Bell "in a manner the Supreme Court never intended," id. at 1259 (A28); (2) relying on Bell to support propositions for which Bell's analysis "lends no support," id.(A27-28); (3) undertaking its own de novo review of the facts and "freely substituting its own factfinding for that of the Master", id. at 1258, 1259 (A25-28); and (4) failing to accord appropriate deference to the trial court in fashioning relief. Id. at 1248 (A4).

The dissent noted that the conditions

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[19] Judges Gibbons, Higginbotham, Sloviter, and Weis dissented from denial of rehearing. Judge Weis joined only in the vote and not the opinion. 718 F.2d at 1247, 1248 (A1-2, A29-30).

condoned by the panel were "more severe than any that have been tolerated in any other locality of the United States," 718 F.2d at 1248 & n.3 (A3), and that the standards announced by the panel "considering that we are dealing with the treatment of human beings, compare unfavorably with the standards mandated by federal law for the treatment of animals." 718 F.2d at 1248 & n.4(A3-4).

Inmates and the County applied for a stay pending the filing of a petition for certiorari, which was granted through November 30, 1983.[20] In supporting papers,[21] jail officials again described severe management, security, and medical problems that would result from a population increase such as the panel had ordered.

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[20] The stay was to continue if a petition for certiorari was filed by that date. On November 28, 1983, County officials filed their petition.

[21] See Affidavit of Robert Vasquez, Director of the Division of Correctional Services, Department of Public Safety, Union County. A123.

ARGUMENT

I

THE COURT OF APPEALS DECISION, WHICH MANDATES DOUBLE BUNKING OF PRETRIAL DETAINEES AND SEVERE OVERCROWDING IN AN ANTIQUATED LOCAL JAIL AGAINST THE CONSIDERED JUDGMENTS OF JAIL ADMINISTRATORS THAT SUCH CONDITIONS WOULD JEOPARDIZE INSTITUTIONAL DISCIPLINE AND SECURITY, CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENTS ESTABLISHED IN EVERY OTHER CIRCUIT AND FUNDAMENTALLY DISTORTS THE ANALYSIS REQUIRED BY BELL v. WOLFISH, 441 U.S. 520 (1979) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The decision of the Court of Appeals' panel should be reviewed by this Court for four reasons. First, the panel's decision involves a question that was left open in Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979) -- the appropriate analysis of extreme overcrowding and the unconstitutional confinement of pretrial detainees at antiquated local jails. Second, the panel virtually removes the protections of the federal Constitution from jail facilities in this country by seriously eroding the careful accommodation of interests

which the Court established in Bell v. Wolfish. Rather than balancing a detainee's retained liberty with the needs of jail officials to maintain institutional security, as the Court required in Bell, the panel has utilized a framework of analysis that jeopardizes the interests of both inmates and jail officials. Third, the panel's decision is in conflict with the requirements established by every other Circuit construing Bell. As a result, the panel has mandated double bunking in conditions more severe than those tolerated anywhere else in the country. Fourth, the panel decision fundamentally misconceives the role and responsibility of federal courts in addressing the national problem of severely overcrowded conditions of confinement for pretrial detainees in local jails.

A. The Present Case Involves a Question Left Open in Bell v. Wolfish

In Bell, the Court left open the question raised here regarding the minimum requirements

for conditions of pretrial detention in "traditional" jails. See 441 U.S. at 543 n.27. As the Special Master's findings of fact demonstrate, the antiquated Union County Jail is that archetypal "traditional jail" to which Bell referred. The "familiar image" of "barred cells, dank, colorless corridors or clanging steel gates," id. at 523, permeates the Master's findings. Moreover, the UCJ is a jail where severe institution-wide overcrowding has led to an inability to deliver minimal basic services and maintain institutional security. This jail is clearly among the facilities which this Court characterized as "markedly different" from the modern jail in Bell, id. at 543 n.27.[22]

The due process analysis in Bell is derived from a consideration of the conditions

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[22] This Court observed that the facility in Bell "represented the architectural embodiment of the best and most progressive penological planning." 441 U.S. at 525.

of pretrial confinement in their totality at the particular facility. Accordingly, the Court's inquiry in Bell focused on the fact that double-bunked inmates at the MCC could enjoy extensive freedom of movement between their "rooms" and spacious, well-equipped common areas. Id. at 541, 543.[23] The ability of inmates to move freely in such facilities for as much as 19 hours a day mitigated the "admittedly rather small sleeping space" which the jail's 75 square foot rooms provided. Id. Consistent with this particularized analysis of the interrelationship of living conditions at the jail, the Court's holding

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[23] For each housing unit at the MCC, the common areas included a multi-purpose room, a balcony education area and a recreation room, which together were equipped with couches, chairs, tables, exercise apparatus, typewriters, laundry facilities, a water fountain, and pantries with microwave ovens. The exercise apparatus in each common area included weight machines, exercise bicycles, dip bars, jogging machines, wall pulleys and medicine balls. See Wolfish v. Levi, 439 F.Supp. 114, 120-21, 128 (S.D.N.Y.), aff'd 573 F.2d 118, 122 (2d Cir. 1978), rev'd sub. nom. Bell v. Wolfish, supra.

upheld double bunking only "as practiced at the MCC." Id. at 541 (emphasis added).

The Court did not discuss, and indeed reserved decision on, the appropriate considerations that should enter into an analysis of overcrowding and double bunking in "traditional" jails. Id. at 543 n.27. The Court, however, explicitly indicated that such a jail would present a different set of factors for proper assessment of pretrial detainees' claims under the Fourteenth Amendment. Id. The present case squarely presents the need for resolution of the important question left open in Bell. In contrast to the MCC, inmates at the UCJ are held in severely crowded cellblocks from which there is virtually no respite, and where the cells, only half the size of the "rooms" in Bell, must be used for much more than sleeping space. Moreover, the excessive population has overtaxed the jail's physical plant, exhausted its limited facilities,

curtailed basic services, heightened tensions and hostility between inmates and jail personnel, and led to an increase in violent incidents. The severe overcrowding, and the totality of the above conditions, were found by the Master to be pushing the jail as an institution to a breaking point.

The panel's decision mandating double bunking would result in an unprecedented further increase in the jail's population far beyond even that which the antiquated facility had ever previously experienced, thereby exacerbating the severe overcrowding from which inmates and their jailers had sought relief. Thus, this case presents compelling reasons for the Court to determine how the methodology of Bell should be applied to a "traditional" jail.

B. The Panel's Decision is in Fundamental Conflict with Bell v. Wolfish

The manner in which the Third Circuit proceeded to answer the question left open in Bell drastically distorts the due process

analysis mandated by this Court. Indeed, the decision threatens to leave even the most debilitating jail conditions virtually immune from any judicial review under the federal constitution. Specifically, the panel decision (1) misconceives the Court's holding in Bell that double bunking is not unconstitutional per se, by essentially holding double bunking is per se constitutional in all circumstances, and (2) imposes double bunking over the strenuous and well-considered objections of the jail's administrators. In so doing, the panel ignored the considered judgments of the administrators of the UCJ that continued overcrowding and double bunking would jeopardize institutional security and endanger the jail's ability to function.

First, in direct conflict with Bell, the panel isolated specific factors (e.g., adequate living space and double bunking) from its consideration of the totality of

the circumstances at the jail. The panel then utilized a mechanistic approach in considering these issues, rejecting any minimum requirement for living space in the antiquated jail -- even one agreed upon by inmates and jail officials, and substantially below the requirements of state corrections regulations -- as a "quantitative" factor not deserving serious analysis. See 713 F.2d at 996 (A55). This approach is wholly at odds with the inquiry into the totality of conditions mandated by Bell.[24]

In sharp contrast, the Court's analysis in Bell carefully examined living space

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[24] The panel isolated "the practice of placing a mattress on the floor for the second occupant of a cell" as "indeed the only condition not meeting constitutional standards," 713 F.2d at 994(A51-52), rather than considering the Master's findings which were replete with references to the deleterious impact of overcrowding on inmates and jail operations. In this manner, the panel misconceived the issues before it and erroneously assumed that resolution of the "the two-in-a-cell or double bunking practice" would "determine the outcome of this appeal." 713 F.2d at 994(A52).

as part of the totality inquiry. See 441 U.S at 542. This analysis was carefully followed by the Master and district court, who examined space considerations as part of the totality. For example, they reviewed the uses demanded of the particular environment, the activities which areas may permit, and the time spent in the area, just as the Court did in Bell. See 441 U.S. at 543. Cf. Rhodes v. Chapman, supra, 452 U.S. at 366 nn.13 & 14 (Brennan, J., concurring) (restrictive living space requirements are mitigated by prisoners' freedom to spend time away from their living units).

Only after consideration of all these factors did the Special Master and District Court reach its conclusion that the conditions at the UCJ were unconstitutional. In short, the panel's failure to inquire into the interrelationship between overpopulation and the uncontroverted serious deficiencies in conditions led it to ignore the factors

that compelled the Master and the district court to find that satisfaction of the "basic human needs" of the jail's pretrial detainees required a limit on the jail's population. (JA90a)[25] Yet, the precise inquiry that the panel failed to make is the very one that this Court in Bell considered essential to proper consideration of the important interests of pretrial detainees in the due process calculus.

Second, the panel's fragmentation of the Bell analysis also prevented the Court of Appeals from accommodating the interests of local jail administrators. Specifically, because of a parsed consideration of the relevant factors, the panel failed to recog-

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[25] In no less than 11 areas, the Master's findings referred to the adverse impact of overcrowding. (JA74-78a)

The panel's decision also improperly isolated duration of confinement from an analysis of the specific conditions existing at the UCJ, 713 F.2d at 996-97 n.18, contrary to the Court's teaching. See Hutto v. Finney, 437 U.S. 678, 686 (1978), cited in Bell, 441 U.S. at 543. In doing so, the panel also completely disregarded the findings of the Master and district court. See 718 F.2d at 1259.

nize and accord deference to the expertise and judgment of the jail's administrators that double bunking and continued overpopulation jeopardized internal order and institutional security at the jail.

The panel's neglect of this critical aspect of the due process inquiry has particular significance here, where from the onset of this case to the filing of their petition for certiorari, the officials responsible for the daily operation of the UCJ have contended that overcrowding and double bunking seriously jeopardize internal order, discipline and institutional security, and endanger the health, safety and well-being of inmates.[26]

Indeed, in conflict with the Court's directives in Bell, the panel substituted its judgment for that of jail officials, whose opinions had been accorded considerable deference by the Special Master and the

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[26] See notes 7 and 12 supra, and text accompanying note 21 supra.

District Court. Ignoring the concerns of the local administrators, the panel then embarked on an unprecedented analysis of the conditions of confinement that directly contradicts the opinions of "the persons who are actually charged with and trained in the running of the particular institution under examination." Bell v. Wolfish, 441 U.S. at 562 (emphasis added).[27] As a consequence, the panel decision virtually assures that the jail will not only continue to be an "overcrowded and understaffed" institution, see Youngberg v. Romeo, supra, but also that it will be forced to operate

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[27] Deference is not only a principle to abide, but "necessary to enable institutions of this type -- often, unfortunately, overcrowded and understaffed -- to continue to function." Youngberg v. Romeo, 102 S.Ct. 2452, 2463 (1982). As in Bell, jail officials here "must be free to take appropriate action to ensure the safety of inmates and corrections personnel...." 441 U.S. at 547. Thus, the jail's

> administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Id. (emphasis added).

in a manner that the administrators charged with its operation have concluded will threaten the jail's ability to function.

As is evident from the above discussion, the fundamental issue that is material to the balancing of interests required by Bell is whether deference has been properly accorded the "expert judgment" of those charged with the "interest in maintaining security and order and operating the institution in a manageable fashion." 441 U.S. at 541 n.23.[28] This interest, which here is lodged undoubtedly in the county jail's administrators, see 713 F.2d at 993 (A48-49), is an important -- indeed, indispensable -- consideration in due process analysis.

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[28] The panel utterly failed to subject the judgments of County officials to any genuine examination, let alone scrutiny under the standards cited in Bell. See 441 U.S. at 541 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827(1974)). Thus, as in Bell, here there is "simply no evidence in the record to indicate that [Union County] officials exaggerated their response" to the "security problem and to the administrative difficulties" which would be posed by double bunking and continued severe overcrowding. 441 U.S. at 550.

The panel's bald and conclusory subordination of this interest to that of state officials, 713 F.2d at 993, 1002 (A48-49, 67-69), ends where Bell requires proper constitutional inquiry to begin.

In summary, the panel simply failed to undertake the traditional balancing and accommodation of interests inherent in and necessary to any due process inquiry. By failing to review the totality of the circumstances at the jail and to accord proper deference to the jail's administrators, the panel's interpretation of Bell overlooks the critical interests of pretrial detainees and their jailers. The Court of Appeals' analysis is not only in conflict with Bell but also effectively sanctions the wholesale withdrawal of the protections of the federal constitution from jail facilities.

C. The Panel Decision Conflicts With That of Every Other Circuit That Has Considered This Issue

No other Circuit in the country has

either adopted an analysis of Bell as restrictive as that employed by the panel, or tolerated conditions as severe as those the panel itself imposed on unwilling jail officials.

Other Circuits have uniformly concluded that Bell stands for the principle that double bunking is not per se unconstitutional, nor per se constitutional. These courts recognize that any analysis that calls for an examination of the "totality of the circumstances," as Bell requires, implies as much. Consequently, with the exception of the Court of Appeals in this case, the Circuits have consistently emphasized the necessity of considering the "totality of conditions" at a pretrial detention facility.[29]

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[29] E.g., Lareau v. Manson, supra, 651 F.2d 96, 103 (2d Cir. 1981) ("Wolfish,...plainly did not hold that double-bunking, much less institution-wide overcrowding, was per se permissible....The question is one of degree and must be considered in light of the particular circumstances of each case and the particular facility in question"); Lock v. [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

Furthermore, no other Circuit has parsed the consideration of living space from its assessment of the "totality of the circumstances."[30]

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] Jenkins, 641 F.2d 488, 491-92 n.9 (7th Cir. 1981) ("This court finds it appropriate to consider all the conditions of confinement in order to determine whether they meet the Wolfish test of amounting to punishment"); Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981) (examining the "combined impact" of conditions); Campbell v. Cauthron, 623 F.2d 503, 507 (8th Cir. 1980) (applying the totality test); Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980) (applying the totality test); Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979) ("We do not hold categorically that putting two men in a cell with a floor space no larger than 65 square feet either is or is not constitutionally permissible. We think that a good deal may depend on the type of institution involved, the nature of the inmates, and the nature of the confinement itself") (citing Bell).

30 E.g., Lareau v. Manson, supra, (15 day limit imposed on double bunking in 60-65 square foot cells); Campbell v. Cauthron, supra, (35-40 square foot minimum cell space imposed for new detainees, 45-50 square feet if detention lasts a week). See note 31 infra. Numerous district courts also have considered minimum space requirements in relation to a totality analysis. E.g., Inmates of the Allegheny County Jail v. Wecht, 565 F.Supp. 1278 (D.Pa. 1983) (population ordered reduced to prescribed cap); Benjamin v. Malcolm, 564 F.Supp. 668 (S.D.N.Y. 1983); Martino v. Carey, 563 F.Supp. 984 (D.Or. 1983) (cell space of approximately 70 square feet ordered); Campbell v. McGruder, 554 [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

And, no other Circuit has held that conditions of confinement as restrictive and stressful as present here are constitutional.[31]

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] F.Supp. 562 (D.D.C. 1982) (30 day and 12 hours a day limit imposed on double-bunking in 70 square foot cells); Heitman v. Gabriel, 524 F.Supp. 622 (W.D.Mo. 1981) (banning double bunking); Vasquez v. Gray, 523 F.Supp. 1359 (S.D.N.Y. 1981) (104 square foot cells limited to two inmates).

[31] See Lock v. Jenkins, 641 F.2d 488, 492 (7th Cir. 1981) (with "no hesitancy" court concludes that conditions for detainees amount to punishment where 37 square foot cells housed one inmate, with net usuable space of only 17 square feet, where inmates received two hours per day of outdoor exercise, and ate meals on their laps); Lareau v. Manson, supra, 651 F.2d at 99-101 (punishment inferred by conditions in which two inmates were housed in 60-65 square foot cells, with open space reduced by furnishings to 36-41 square feet, where illumination in cell enough only for one inmate to read, meals taken in dayroom to which inmates had regular access, exercise permitted five days a week in outdoor courtyards for 1½ hours per day, and in indoor gym twice a week for 1½ hours, fighting and tension increased and visitation for each inmate reduced to 45 minutes per day as a result of overcrowding); Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980) ("no difficulty" finding due process violation with respect to crowding of inmates in multiple occupany cells providing between 28 to 17 square feet of living space per inmate, where cellblock corridor was found inadequate to provide opportunity for exercise, and where

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

The panel's decision here is dramatically inconsistent with the position of other Circuits. Not only are the untried men and women at the UCJ held in conditions that other circuits have determined "amount to punishment" under the Due Process Clause, but also the conditions tolerated by the panel would constitute cruel and unusual punishment under the Eighth Amendment in every other Circuit.[32]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE] meals were taken in cells; imposing minimum space requirements for detainees of 45-50 square feet if detention lasts a week or more). See also Jones v. Diamond, 636 F.2d 1364, 1373-74, 1375-76 (5th Cir.) (in banc) (remanding for imposition of a maximum population cap to eliminate overcrowding), cert. dismissed sub nom. Ledbetter v. Jones, 453 U.S. 950 (1981). Cf. Jordan v. Wolke, 615 F.2d 749, 751, 753 (7th Cir. 1980) (no constitutional violation where inmates' living quarters allowed 59 square feet per person, with access to cell, corridor, and dayroom, where design capacity of jail was not exceeded, and where no finding of adverse conditions resulting from population).

[32] See, e.g., Campbell v. Cauthron, supra, 623 F.2d at 506, 507 ("no trouble concluding" that convicted inmates subjected to cruel and unusual punishment where housed in cells affording 18-26 square feet of living space, and despite practice

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

The in banc dissenters were undoubtedly correct in noting that "[t]he minimum standards announced in the panel opinion for conditions of pretrial detention...are more severe than any that have been tolerated in any other locality in the United States." 718 F.2d at 1248 (dissent)(A3). But the panel's decision not only conflicts with that of every other Circuit for the confinement of humans, its analysis also allows conditions that are "far more severe than federal law tolerates for animals" in captivity. Id. at 1248 & n.4, 1252 &

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] of "allowing inmates to walk around in the narrow corridor between cells"); Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) ("the housing of two men within a little 35-40 square foot 'cubby-hole' was "equally or more offen[sive]" than other intolerable conditions to "contemporary standards of decency"; "minimum space to call one's own is a primary psychological necessity"); Burks v. Teasdale, 603 F.2d 59, 61-63 (8th Cir. 1979) (housing of two men in 47 square foot cells, allowing each 23.5 square feet of space, is unconstitutional; housing of two men in 65 square foot cells "and keeping them there for long periods of time can produce intolerable tensions and will almost inevitably cause trouble not only to the inmates but also to prison personnel").

n.6, 1258 (A3-4, 12, 25)(dissenting opinion) (citing Animal Welfare Act, 7 U.S.C. §§ 2131-2156 (1976); Cruelty to Animals Act, 45 U.S.C. § 71-74 (1976); implementing regulations, 9 C.F.R. §§ 1-4 (1983)). It is therefore important that the Court review a decision that wholly erodes any sense of constitutional protection for pretrial detainees and so completely conflicts with the application of Bell in other Circuits that untried and unconvicted detainees can now be treated far worse than captive animals.

D. Conclusion

The panel's decision fundamentally misconceives the role and responsibility of the federal courts in addressing the grave problems which severe overcrowding represents for antiquated local jails. This problem is not an isolated phenonmenon, but rather involves issues of national significance, as an increase in state prison

population throughout the country has led to overcrowding at local jails for presumptively innocent individuals.[33] Additionally, the panel has not only ignored the need for some constitutional protection of pretrial detainees; it also has totally rebuked the considered judgments of jail administrators. Faced with an antiquated and overcrowded jail, the panel imposed an unyielding "two men, one cell" principle that is wholly at odds with the balanced accommodation of competing interests mandated by Bell. To reach this result, the panel ignored the detailed factual findings of the Special Master and the District Court, and usurped

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33 See note 4 supra. The Court previously has noted the disturbing consequences which befall the presumptively innocent "accused [who] cannot make bail" and is "generally confined [for months] in a local jail." See Barker v. Wingo, 407 U.S. 514, 520 (1972) (recognizing that the "overcrowding and generally deplorable state of those institutions," coupled with [l]engthy exposure to these conditions" 'has a destructive effect on human character'," and that the imposition of these consequences on "anyone who has not yet been convicted is serious....").

the power of lower courts to fashion appropriate equitable relief to remedy a situation that both the inmates and jail administrators considered intolerable.[34]

We respectfully submit that any decision that deviates so substantially from the Court's precedents, the decisions of other Circuits and the fundamental obligations of a federal court merits review in this Court.

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[34] Here, the "scope of the remedy" decreed by the district court was directly related to the "nature of the violation." Swann v. Charlotte-Mecklenberg Board of Educ., 402 U.S. 1, 16 (1971). The Circuit panel disregarded the rule that in "shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." Lemon v. Kutzman, 411 U.S. 192, 200 (1973). See Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978). Moreover, the remedial relief here, ordering removal of state prisoners from a county jail, has been used in comparable circumstances. E.g., Gross v. Tazewell County Jail, 533 F.Supp. 414, 418-20 (W.D.Va. 1982); Benjamin v. Malcolm, 528 F.Supp. 925 (S.D.N.Y. 1981). See also Duran v. Elrod, 713 F.2d 292, 297, 298 (7th Cir. 1983), where the Seventh Circuit recently upheld a more far-reaching decree providing for the reduction of the inmate population at the Cook County Jail through release, refusing to require double bunking as a "remedy."

II

THE COURT OF APPEALS DECISION, WHICH MANDATES THE DOUBLE BUNKING OF CONVICTED PRISONERS IN AN ANTIQUATED LOCAL JAIL AGAINST THE CONSIDERED JUDGMENTS OF THE JAIL'S ADMINISTRATORS, SHOULD BE REVIEWED BECAUSE IT CONFLICTS WITH THE ANALYSIS REQUIRED BY RHODES v. CHAPMAN, 452 U.S. 317 (1981), AND WITH THE CONSTITUTIONAL STANDARDS UNDER THE EIGHTH AMENDMENT ESTABLISHED IN EVERY OTHER CIRCUIT.

The panel's analysis of the Eighth Amendment suffers from the same analytical flaws discussed above. First, the panel severely distorts this Court's analysis in Rhodes v. Chapman, 452 U.S. 317 (1981), and effectively eliminates federal court review of conditions for post-conviction confinement at antiquated local jails. Second, by selectively applying only parts of the Rhodes analysis the panel's approach to the Eighth Amendment also conflicts with that of every other Circuit.

Rhodes v. Chapman identifies the pertinent factors that must be considered in any Eighth Amendment scrutiny of the con-

ditions in which a state may confine persons convicted of crimes. 452 U.S. at 344-47. Conditions of confinement are cruel and unusual if under contemporary standards of decency they, "alone or in combination," "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347. Thus, it is from even a cursory review evident that Rhodes places overriding significance on an analysis of the totality of the circumstances in a facility. Id. at 362-63 & n.10 (Brennan, J., concurring).

Clearly, the Court's analysis in Rhodes did not focus solely on double bunking but rather examined the total effect of an "unanticipated increase in prison population." 452 U.S. at 348. The assessment of the totality in Rhodes revealed an environment that is fundamentally different from the Union County Jail. The facility in Rhodes was a modern facility equipped

with gymnasiums, workshops, school rooms, day rooms, two chapels, a hospital ward, commissary, barber shop and library. Outdoors there were recreation fields, a visitation area and a garden. The cells themselves contained an area of 63 square feet, a cabinet-type night stand, a wall-mounted sink with both cold and hot water, a toilet, a shelf, a radio, a window, and another cabinet. Id. at 348 & n.13. In these circumstances, the only deprivations produced by an increased population amounted to marginally diminished job and educational opportunities. Id. at 348. Violence had not increased, and any other detrimental consequences were merely a matter of "theory." Id. at 348-49. Indeed, the district court's findings of fact in Rhodes provided no support for the conclusion that double celling created even a "potential for frustration, tension or violence." Id. at 349 n.14. While double celling at the prison

in Rhodes did not constitute cruel and unusual punishment under the Eighth Amendment, the Court, after reaching this conclusion, indicated "the situation in a different case" could well produce the opposite result. Id. As the description of the unlighted and dismal conditions in the crowded cellblocks at the antiquated UCJ makes clear, the facility at issue here presents that "different case."

These essential differences, however, were overlooked by the panel because it distorted the Rhodes analysis in three fundamental respects. First, the panel completely omitted two important aspects of the Rhodes calculus from its analysis. Specifically, the panel initially failed to consider whether any challenged practices at this jail inflicted pain without a penological purpose. See 452 U.S. at 347, 348 (citing Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976)). Yet, it is clear from

the record that unnecessary and wanton pain was inflicted upon the inmates at the UCJ because the severe overcrowding, the increased exposure to infectious disease, the lack of clean clothing, the isolation from family and loved ones, and the total lack of exercise, serve absolutely no penological purpose.

In addition, the panel failed to consider whether the conditions at the UCJ are grossly disproportionate to the severity of the crimes committed by inmates sentenced to the county jail. See 452 U.S. at 347, 348 (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)). The overwhelming majority of these inmates at the UCJ have been convicted of shoplifting, driving on the revoked list, failing to pay child support, or other minor property offenses. See JA263a-271a. Yet, these individuals are forced to suffer the mental stress of oppressive confinement at the UCJ without

respite, the physical degeneration from lack of exercise, the risk of serious injury in violent disruptions, the emotional pain of no real visitation, and the health risk of contracting tuberculosis, hepatitis or other diseases easily communicable in close confinement. Because the panel misconstrued the basic teachings of Rhodes, the court of appeals completely overlooked these critical aspects of a proper Eighth Amendment analysis.

Second, the panel erroneously isolated only one element from the totality calculus mandated by Rhodes. Specifically, the panel referred to the use of "floor mattresses" as "indeed the only condition not meeting constitutional standards," 713 F.2d at 994 (A51-52), rather than considering, as Rhodes mandates, the interrelationship of the population and all other jail conditions. This sharp and unprecedented deviation from the Rhodes

calculus resulted partly from the panel's mistaken reliance on an analysis that first appeared in Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981). See 713 F.2d at 999 & n.23 (A61-62). Wright, however, was decided more than three months before this Court's decision in Rhodes and can hardly be read as an interpretation of the subsequent decision. Even more important, Wright was implicitly rejected in a subsequent decision of the Ninth Circuit which is consistent with the totality approach. Hoptowit v. Ray, 682 F.2d 1237, 1247, 1249 ((9th Cir. 1982); see Ruiz v. Estelle, 679 F.2d 1115, 1139-40 n.98 (5th Cir. 1982). Therefore, the panel has followed a pre-Rhodes decision to formulate an approach that has been repudiated by every Circuit after Rhodes.

Third, and perhaps most important, the panel failed to employ the criteria established by this Court for determining

what meets Eighth Amendment standards. The district court and Special Master correctly relied on this Court's instruction to look to objective factors for guidance, such as objective indicia derived from history,[35] the action of state legislatures,[36] and the "public attitude toward a given sanction." 452 U.S. at 346-47, 348 n.13.[37]

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[35] The district judge referred to nationwide jail practices to demonstrate that the vast majority of all local jails provided spatial conditions comparable to those required by his order. 537 F.Supp. at 1005 n.18 (A98-99 & n.18).

[36] Both the district court and Special Master, were guided by the objective standards set forth in New Jersey's substantive law regulating conditions in county jails, as well as by the assessments of state corrections officials on the relative importance of particular programs "in a county jail setting for alleviating physical and mental stress." See 537 F.Supp. at 1000, 1002, 1005, 1006, 1011 (A88, 91, 98, 99-101, 110-11); JA73a & n.9, 75a-76a, 82a-83a, 92a-93a, 96a-97a. The state's regulations derive from the New Jersey legislature's direction to the Corrections Department to promulgate regulations fixing minimum standards for inmate housing and care in county jails. See N.J.S.A. 30:1B-10. See generally note 37 infra.

[37] New Jersey's regulatory framework, on which the Special Master and the district court relied, see note 36 supra, clearly demonstrates that the

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These objective considerations provide strong and compelling roots in Eighth Amendment criteria for the district court's decision.[38]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE] public in New Jersey does not endorse keeping inmates confined in the sordid conditions present at the UCJ. These regulations require, inter alia, 105 square feet of space per inmate as a standard for jail construction and renovation (see N.J.A.C. 10A:31-2.8(a)4 to -2.8(a)12), provision of opportunities for regular exercise (see N.J.A.C. 10A:31-3.16(b)10), and clean clothing. Moreover, the regulations are designed to fix "the minimum criteria" for "functions and operations of county correctional facilities", and "serve as a measure by which the citizens of New Jersey may better judge whether their communities' correctional programs are adequate to meet the needs of those incarcerated." N.J.A.C. 10A:31-1.1 (1979). See, e.g., Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977) ("[s]tate codes also are a valuable index into what levels of decency the public, expressing itself through the Legislature, is prepared to pay for."); accord Ramos v. Lamm, 639 F.2d 559, 567 & n.10 (10th Cir. 1980), cert. den. 101 S.Ct. 1759 (1981).

The district court also noted that New Jersey taxpayers had funded construction of new prison space to alleviate overcrowding and that public officials, including the Governor of New Jersey, had viewed the problem of overcrowding in county jails as "the results of [the state's] neglect" and emphasized that the state budget finally would begin to provide "the money to start to rectify this problem" by "plac[ing] state prisoners into state custody where they rightfully belong." 537 F.Supp. at 1009-10 (A107-108).

[38] The panel faulted the Master and the district court for not referring to "basic background facts" [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

In contrast, the panel failed to point to any objective criteria that supports its mandatory double-bunking order. Indeed, the considered opinions of jail officials that overcrowding would plunge the jail into an "extremely volatile situation," (JA77a), was not even "deemed relevant in the panel's constitutional calculus." 718 F.2d at 1259 (dissenting opinion)(A27).

Finally, the panel decision conflicts with that of every other Circuit in the nation on important Eighth Amendment issues. For example, only days before the panel's decision, the Seventh Circuit affirmed a district court decision holding that housing only one person in conditions that are virtually identical to those at the UCJ that the panel mandated for two persons

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] about the relationship between inmates and the jail authorities. 713 F.2d at 999 n.22 (A61-62 n.22). The Master's report and the district court opinion, however, are replete with descriptions of "background facts" depicting the deteriorating relationship between inmates and jail authorities caused by severe overcrowding. See notes 7 & 12 supra.

constituted cruel and unusual punishment.[39] The decision of the Seventh Circuit in Faulkner is entirely consistent with the analysis and approach followed in every other Circuit after Rhodes.[40]

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[39] Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983), aff'g Hendrix v. Faulkner, 525 F.Supp. 435, 523 (N.D. Ind. 1981). See 537 F.Supp. at 1008. In Faulkner, as in the UCJ, the principal area to which inmates had access was a cell corridor. 525 F.Supp. at 523. The district court found, and the Court of Appeals concurred, that merely allowing the inmates to walk around in the corridor between the cells would not be adequate exercise because the inmates' cellblock area was used not only for sleeping but also during the waking hours (as it is in the UCJ). 525 F.Supp. at 524. Compare 713 F.2d at 995, 1000 n.29 (A54, 65-66 n.29) with 718 F.2d at 1258 (A25-26). Moreover, in Faulkner, unlike at the UCJ, inmates did get some outside exercise.

[40] The Fifth Circuit, in Ruiz v. Estelle, 679 F.2d 1115, 1140, 1146-48 (5th Cir. 1982), carefully evaluated the need for minimal living space in the context of a totality analysis under the Eighth Amendment. In a prison where inmates had access to gymnasiums, outdoor playing fields, craft shops, libraries, and dining rooms, and agricultural work, the Fifth Circuit affirmed a requirement that each inmate living in a dorm have at least 40 square feet of living space and vacated a prohibition on double bunking in 45 square foot cells, noting that it was the use of the cellblock living area only for sleeping which might make cell space of 18-20 square feet adequate. Accord Hoptowit v. Ray, 688 F.2d 1237, 1248-49 (9th Cir. 1982); see generally

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Thus, the only anomaly in the decisions of the Courts of Appeals is the panel decision in the present case, which follows an analysis and reaches a result that would be constitutionally intolerable

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Stewart v. Winter, 669 F.2d 328, 335-36 (5th Cir. 1982); Jones v. Diamond, supra, 636 F.2d at 1368, 1373.

The Fourth Circuit in Nelson v. Collins, 659 F.2d 420, 428 (4th Cir. 1981), in framing its Eighth Amendment analysis of double bunking in new state prisons comparable to the facility in Rhodes, also looked to considerations of living space, the substantial opportunities available to alleviate periods of close confinement with others, and observed that double bunking in the newer institutions left undisturbed a previous prohibition of double bunking in 40 square foot cells in older institutions. Id. at 422-23, 429. See Johnson v. Levine, 450 F.Supp. 648, 657, 658 (D.Md.), aff'd 588 F.2d 1378, 1381 (4th Cir. 1978).

Cf. Smith v. Fairman, 690 F.2d 1221 (7th Cir. 1982) (confining two inmates in 55 and 64 square foot cells does not cause an Eighth Amendment violation where inmates averaged 4 to 6 hours a day moving freely about the prison, some worked or attended school during the day, physical violence had been reduced, inmates enjoyed possession of electronic equipment including tape players, radios, or televisions in their cells, and almost unlimited personal property including books and records). Indeed, Smith highlights the fact that violent criminals in maximum security institutions are allotted far superior conditions than those imposed by the panel decision on persons convicted of relatively minor offenses who are confined at the antiquated Union County Jail.

in any other Circuit. Indeed, the panel decision is also inconsistent with the decisions of other Circuits antedating Rhodes, some of which the Court in Rhodes cited as examples of appropriate federal court action.[41] See 452 U.S. at 352 & n.17.[42]

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41 See, e.g., Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. den. 101 S.Ct. 1759 (1981); Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

42 The panel decision sharply conflicts with decisions from the Tenth Circuit, despite these decisions having been cited with approval by this Court in Rhodes. Compare 713 F.2d at 999-1000 nn.25 & 26 (A63 nn. 25 & 26) with 452 U.S. at 352 & n.17 (citing Ramos); id. at 364 (Brennan, J., concurring). In rejecting the Tenth Circuit's Eighth Amendment analysis as inconsistent with Rhodes, the panel totally misconceived the import of those decisions which focus on the necessity under the Eighth Amendment for a jail or prison to provide an "habilitative" environment, a term used in the Tenth Circuit, and similarly referred to by the district court here, to describe one of life's basic necessities, i.e., sufficient living space to make shelter "habitable", see 537 F.Supp. at 1008(A104-05) (citing Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980); and Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977)). Thus, a requirement for minimum living space was not, as the panel apparently believed, see 713 F.2d at 999-1000 nn.25 & 26(A63), intended to create a rehabilitative environment, an objective that this Court in Rhodes explained was beyond the proper reach of Eighth Amendment analysis. See 452 U.S. at 348.

Not only has no other Circuit tolerated conditions of confinement for convicted inmates as inhumane as those at the UCJ, but they are of such severity that "[t]he conditions of crowding for human beings found by the Master would, if imposed on animals, violate federal law." 718 F.2d at 1252 n.6 (A12). The panel was only able to reach this result by ignoring most of the factors this Court has deemed integral to the Rhodes analysis and fundamentally misconceiving others.

For these reasons, the Court should grant certiorari.

III

THE COURT OF APPEALS DECISION, WHICH UNDERTOOK DE NOVO FACTFINDING IN ABROGATION OF ITS ROLE AS AN APPELLATE TRIBUNAL, SHOULD BE REVIEWED BY THIS COURT BECAUSE IT CONFLICTS WITH THE STRICTURES OF FED.R.CIV.P. 52(a).

The Court of Appeals de novo factfinding and disregard of the findings of a Special Master, which had been adopted without modification by the District Court, conflicts with this Court's admonition that "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). Rather than be confined by the clearly erroneous standard of Fed.R.Civ.P. 52(a), the panel "simply rewrote the facts" and indulged in repeated "speculation" to conclude that the Commissioner's remedial scheme was constitutionally sound and preferable to the district court's decree. 718 F.2d at 1258 (dissent)(A25-27).

The panel's disregard of the "clearly erroneous" standard for review of factual findings raises questions that are virtually identical to those presently before this Court in Bose Corporation v. Consumers Union, Inc., 692 F.2d 189, 195 (1st Cir. 1982), cert. granted 51 U.S.L.W. 3774 (1983). In Bose, the First Circuit held that an appellate court was not limited by a clearly erroneous standard in reviewing facts relating to a constitutional issue. Rather, the court "must perform a de novo review, independently examining the record...." Id. at 195. The panel here examined the record de novo as did the Court in Bose. Both in its explicit statement acknowledging its "own review of the record", 713 F.2d at 996-97 n.18(A56), and in many premises that underlie its reasoning, the panel failed to apply the "clearly erroneous" standard to basic historical facts. This approach is entirely contrary to the careful reliance

on detailed factual findings that the Court deemed essential to Due Proces and Eighth Amendment analysis in Bell and Rhodes. See Bell, 441 U.S. at 542 & n.25; Rhodes, 452 U.S. at 347-48. As a consequence of this unauthorized de novo review, the panel dramatically altered the Master's findings. See 713 F.2d at 996 (A54-55).[43]

Since the question presented is closely related to that in Bose, and since the panel failed to discharge a basic responsibility of an appellate court, the Court should grant certiorari in order to clarify the proper scope of review of factual findings in jail conditions' litigation.

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[43] For example, the Master found the cell corridors "would allow little opportunity for free movement or exercise." (JA84a) Yet the panel concluded that the corridor provided an adequate area for inmates to obtain exercise. 713 F.2d at 1000 n.29 (A65). Such contradictory "findings" are found throughout the panel's opinon. See 718 F.2d at 1257-59 (dissent)(A25-27). Even more troubling is the panel's assumption that the jail could continue to provide essential services to inmates even if its population doubled, in direct contradiction of the Master's finding that overpopulation led to the critical deficiences in essential services at the UCJ. See 718 F.2d at 1257 (A25-27).

CONCLUSION

For the reasons stated above, the Court should grant certiorari to review questions of national importance relating to the proper role of federal courts in assessing the conditions of confinement in overcrowded and antiquated jails throughout the country.

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